CHAPTER 9

The Character of *jus cogens* Norms and the International *ordre public*

1 The Rationales Identified

A frequent argument against the immunity of foreign State representatives—in particular that of (former senior) State officials *ratione materiae*—is based on the normative hierarchy in international law. It is maintained that the prohibition of the commission of serious crimes amounting to *jus cogens* trumps the rule on immunity, which fails to be peremptory and is therefore of a lower rank. In the *Lozano* case, for instance, the Italian Court of Cassation asserted

[T]he eventual conflict must be resolved on the systematic level of coordination and on the basis of the criterion of balancing interests, priority being given to the principle of higher rank and of *jus cogens* character, and therefore to the guarantee that the most serious crimes which violate the inviolable rights of the freedom and dignity of the human being, . . . , in respect of the interests of States in sovereign equality and non-interference, the violation of those fundamental rights representing “the breaking point of the tolerable exercise of sovereignty”, in other words the “abuse of sovereignty” of the State, shall not go unpunished.1

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The same argument has also been made in proceedings concerning the immunity of States. The ECtHR seems to accept that the prohibition of torture, to which the status of _jus cogens_ is attributed, prevails over immunity _ratione materiae_ of (former high-ranking) State officials in criminal matters whereas no such _jus cogens_ exception exists in civil proceedings directed against a foreign State. Due to their superior status, _jus cogens_ norms prohibiting the commission of serious crimes take precedence over inferior rules including that on immunity of foreign State representatives.

This approach has been criticised in other decisions of national or international courts mainly concerning the immunity of foreign States. Most prominently, the ICJ ruled in _Jurisdictional Immunities of the State_ that _jus cogens_ norms and the immunity of States pertain by their nature to different issues. While immunity constitutes a procedural bar to the exercise of foreign jurisdiction, _jus cogens_ norms prohibiting the commission of serious crimes relate to the lawfulness of the act. In other words, while the former is procedural in nature, the latter refers to substantive law. There is accordingly no conflict between the rule on State immunity and the prohibition of serious crimes that have acquired the status of _jus cogens_. The hierarchically superior _jus cogens_ rule cannot therefore override the lower-ranking principle of State immunity. Although this reasoning concerns the immunity of a foreign State before the jurisdiction of another State, it can also impact on the immunity _ratione personae_ of incumbent Heads of State due to the similar nature of these two immunity pleas.

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2 Al-Adsani v. United Kingdom, App. No. 35763/97, 2001-xi Eur. Ct. H.R. at § 65; see also ibid., dissenting opinion of Judge Loucaides; ibid., joint dissenting opinion of the Judges Rozakis and Callish, joined by the Judges Wildhaber, Costa, Cabral Barreto and Vajić at § 4, who decided that there was a _jus cogens_ exception not only to immunity _ratione materiae_ of (former senior) State officials accused of serious crimes in criminal matters, but also to State immunity in civil proceedings. They reached this conclusion on the basis that _jus cogens_ norms have prevailing status regardless of the nature of the proceedings. Cf. _Jurisdictional Immunities of the State_ (Federal Republic of Germany v. Italy: Greece intervening), Judgment, 2012 (Feb. 3) at § 92–97, where the ICJ discussed the normative hierarchy argument and rejected it in the context of State immunity.